

FEDERAL CIRCUIT COURT OF AUSTRALIA

*MOR v MINISTER FOR IMMIGRATION &
ANOR*

[2018] FCCA 1487

Catchwords:

MIGRATION – Partner visa – whether compelling reasons shown not to apply Sch 3 criteria – application for judicial review – partner visa subclass 820 refused by delegate and Tribunal – applicant previously on now-cancelled student visa subclass 573 – previous application for protection visa refused – s 376 certificate – intervention order application between applicant and sponsor – evidence of cohabitation – failure to attend first hearing at court – application dismissed – application in a case requesting reinstatement – final hearing granted – criteria for partner visa – whether compelling reasons not to apply relevant criteria – hardship as common factor – grounds of review rejected – non-disclosure of s 376 certificate did not cause denial of procedural fairness – continuing relationship not of itself a compelling reason – Tribunal properly considered matters – adducing evidence on judicial review – application dismissed.

Legislation:

Acts Interpretation Act 1901 (Cth), s.15AB

Federal Circuit Court Rules 2001 (Cth), r 13.03C

Migration Act 1958 (Cth), ss.5, 54, 55, 65, 359A, 359AA, 360, 375A, 376, 476, 438

Migration Regulations 1994 (Cth), reg 1.20J, 2.03, Sch 2 cl 820.211, 202.222, Sch 3 criteria 3001

Migration Regulations (Amendment) 1996 (No 75)

Cases cited:

AIM15 v Minister for Immigration and Border Protection [2017] FCA 734

Attorney-General (NSW) v Quin (1990) 170 CLR 1

AVO15 v Minister for Immigration and Border Protection [2017] FCA 566

Babici v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 141 FCR 285

BEG15 v Minister for Immigration and Border Protection (2017) 253 FCR 36

Berenguel v Minister for Immigration and Citizenship (2010) 84 ALJR 251

Briginshaw v Briginshaw (1938) 60 CLR 336

Choi v Minister for Immigration and Border Protection [2018] FCA 291

Craig v South Australia (1995) 184 CLR 163

George v Rockett (1990) 170 CLR 104

Gupta v Minister for Immigration and Border Protection [2016] FCA 1004

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24

Minister for Immigration and Border Protection v CQZ15 (2017) 253 FCR 1
Minister for Immigration and Border Protection v BJN16 (2017) 253 FCR 21
Minister for Immigration and Border Protection v Singh (2016) 244 FCR 305
Minister for Immigration and Border Protection v SZSSJ (2016) 259 CLR 180
Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611
Minister for Immigration and Citizenship v SZIZO (2009) 238 CLR 627
Minister for Immigration and Citizenship v WZARH (2015) 256 CLR 326
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611
Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1
Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) 78 ALJR 992
MZAFZ v Minister for Immigration and Border Protection (2016) 243 FCR 1
MZYPZ v Minister for Immigration and Citizenship [2012] FCA 478
MZZUQ v Minister for Immigration and Border Protection (2015) 145 ALD 662
MZXHY v Minister for Immigration and Citizenship [2007] FCA 622
NAHI v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 10
Plaintiff M64/2015 v Minister for Immigration and Border Protection (2015) 258 CLR 173
Re Refugee Tribunal; Ex parte Aala (2000) 204 CLR 82
Sami v Minister for Immigration and Citizenship (2013) 139 ALD 1
SZJMG v Minister for Immigration and Citizenship [2008] FCA 1145
SZSSG v Minister for Immigration and Border Protection [2018] FCA 670
SZVDC v Minister for Immigration and Border Protection [2018] FCAFC 16
Waensila v Minister for Immigration and Border Protection (2016) 241 FCR 121

Applicant:	SURENDER MOR
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	MLG 1452 of 2016
Judgment of:	Judge A Kelly
Hearing date:	4 June 2018
Date of Last Submission:	4 June 2018

Delivered at: Melbourne

Delivered on: 14 June 2018

REPRESENTATION

The Applicant: In person

Counsel for the Respondents: Mr Roe

Solicitors for the Respondents: Australian Government Solicitor

ORDERS

- (1) The application be dismissed.
- (2) The applicant pay the costs of the first respondent fixed at \$7,328.
- (3)
- (4)
- (5)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT MELBOURNE

MLG 1452 of 2016

SURENDER MOR

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. By application filed 8 July 2016, judicial review is sought of a decision of the Administrative Appeals Tribunal (*Tribunal*) made on 10 June 2016 under the *Migration Act 1958* (Cth) (*Act*). The Tribunal affirmed a decision of a delegate of the first respondent (*Minister*) to refuse the applicant a Partner (Temporary) (Class UK) (subclass 820) visa.
2. The applicant, a male Indian national aged 31 years, arrived in Australia in 2009 as the holder of a Student (Temporary) (class TU) (subclass 573) visa.

3. The applicant's student visa was cancelled on 14 March 2013, a fact which he discovered in July 2013 while attempting to depart through customs in Australia.
4. On 8 July 2013, the applicant was granted a Bridging visa E on departure grounds. A Bridging visa is not a substantive visa within the meaning of the Act: see s 5.

Background

5. An application for a protection visa lodged by the applicant on 15 July 2013 was refused on 14 October 2013. On 19 February 2014, the then Refugee Review Tribunal affirmed the decision to refuse the protection visa application. On 20 March 2014, the applicant applied for judicial review but withdrew this application on 4 March 2015.
6. The applicant then changed tack. On 10 April 2015, the applicant lodged an application for Ministerial Intervention. On 22 April 2015, the application for Ministerial Intervention was deemed inappropriate for consideration.
7. On 8 May 2015 the applicant applied for the present visa. On 29 January 2016, a delegate of the Minister refused the application, doing so on the basis that the applicant did not satisfy the criteria in cl 820.211(2)(d)(ii) of Sch 2 to the *Migration Regulations 1994*. Schedule 3 of the regulations contained certain criteria that were applicable to the applicant's visa application.
8. On 16 February 2016, the applicant applied to the Tribunal for a review of the decision refusing the partner visa.
9. On 25 February 2016, a delegate of the Minister issued a certificate pursuant to s 376 which stated as follows:

***CERTIFICATE REGARDING ADMINISTRATIVE APPEALS
TRIBUNAL'S DISCRETION TO DISCLOSE CERTAIN
INFORMATION UNDER s376 OF MIGRATION ACT 1958.***

PUBLIC INTEREST FOLIOS

I notify the Administrative Appeals Tribunal that s376 applies to the document/s, any matter contained in the document/s or information contained in folio/s 113 – 115 of file number BCC2015/1331352 and I

certify the disclosure of this material would be contrary to the public interest.

10. The delegate's certificate notified the Tribunal that s 376 applied to the identified documents for the reason that the information contained in them had been given to the Minister, or an officer of the Department, in confidence and that s 375A of the Act did not apply.
11. The delegate's certificate also provided a description of the information contained in the documents as containing an interim intervention order (*IVO*) which had been made against the applicant by his sponsor, Ms Coles-Janess, on her own behalf and on behalf of her children together with a family violence complaint which had been made by the sponsor against the applicant, all of which information had been provided to the delegate after the decision to refuse the application.
12. On 6 June 2016, the applicant appeared before the Tribunal to give evidence and present arguments in relation to the issues arising on the decision under review. In the course of this hearing, evidence was given by the applicant together with his sponsor.

Tribunal decision

13. The Tribunal, noting that the applicant did not hold a substantive visa, turned to address Schedule 3 criteria 3001. By this criteria, the applicant was required to have lodged his partner visa application within 28 days of the last date on which he had held a substantive visa: Reasons, [9]-[11]; Sch 3, par 3001(2)(c)(iii).
14. The Tribunal found that the applicant had last held a substantive visa on 14 March 2013 and that, as his application had not been lodged until 8 May 2015, the Sch 3 criteria 3001 were not satisfied: Reasons, [11].
15. The Tribunal next examined whether the applicant had shown that there were compelling reasons not to apply the Sch 3 criteria.¹ The Tribunal concluded no compelling reasons were shown.
16. The Tribunal rejected the first basis advanced by the applicant as a compelling reason why Sch 3 criteria ought not to be applied. The applicant claimed that he had not been notified by the Department of the cancellation of his substantive visa in 2013.

¹ See cl 820.211(2)(d)(ii).

17. The second basis relied on by the applicant as providing a compelling reason not to apply the Sch 3 criteria was his long-standing relationship with his sponsor. The Tribunal accepted that there was some evidence to support a claim that the parties had been in a relationship since 2013. It found that there was minimal independent evidence of cohabitation and while accepting the photographs were of the applicant and his sponsor, did not accept that the photographs established the parties had socialised in 2013-2014.
18. In addition, the Tribunal noted that on 8 February 2016 the sponsor had applied for an IVO, naming the applicant as respondent to that order. The applicant initially denied having ever been separated from the sponsor or having had an IVO taken out against him. Before the Tribunal, the applicant was then invited to comment or respond to the adverse information comprised of the IVO.² The Tribunal found that the applicant had been untruthful in the evidence given about his relationship with the sponsor including in relation to the granting of the IVO. It did not accept that the IVO was merely the result of a dispute or that the parties had separated only for a period of 15 days. The Tribunal was not satisfied that the applicant's claim to a long-standing relationship with his sponsor afforded a compelling reason not to apply the Sch 3 criteria to his claim.
19. The third basis on which the applicant submitted that compelling reasons existed for not applying the Sch 3 criteria was that he and the sponsor relied upon and needed one another and that he assisted with the care of and was close to the sponsor's children. In rejecting this claim, the Tribunal found the sponsor was financially independent, owned her own home, had a strong social network and was the primary carer for her two daughters. Accepting that an emotional attachment between the parties was a normal aspect of a partner relationship, it was not satisfied that this would of itself provide a compelling reason not to apply the Sch 3 criteria to the present application.
20. In those circumstances, the Tribunal affirmed the delegate's decision to refuse the partner visa application.

Procedural history

² See s 359AA.

21. On 8 July 2016, the applicant filed an application for judicial review of the Tribunal's decision made on 10 June 2016.
22. The applicant affirmed an affidavit on 8 July 2016 to which he exhibited a copy of the Tribunal's decision but otherwise advanced no further evidence in relation to this application.
23. By a response dated 15 July 2016, the Minister opposed the grant of relief on the ground that the Tribunal decision was not affected by jurisdictional error.
24. On 21 December 2016, the application was dismissed pursuant to rule 13.03C(1)(c) of the *Federal Circuit Court Rules 2001*.
25. On 5 January 2017, the applicant filed an application in a case. The applicant filed an affidavit affirmed on 5 January 2017 deposing that he had been sick at the time of the hearing. The applicant exhibited a series of emails transmitted between himself and the respondent's solicitor on 20 December 2016, one of which attached a medical certificate dated 19 December 2016 which certified as follows:

This is to certify that I have examined Surender Mor today, and I confirm that he will be unfit to stand in a court hearing due to a medical illness. I understand the hearing is scheduled for 21 Dec 2016
26. On 20 April 2017, orders were made listing the proceeding for final hearing following the outcome of *Minister for Immigration and Border Protection v Singh* M12/2017.³ Special leave to appeal from the Full Court's decision in *Singh* was refused.
27. On 25 May 2018, the respondent's solicitor affirmed an affidavit deposing to having examined a file retained in relation to the applicant by the Department of Immigration and Border Protection. It was deposed that within the departmental file, three folios (being folios 113-115) had been identified in respect of which the s 376 certificate had issued. The certificate was exhibited to the affidavit together with a sealed envelope containing copies of the documents comprised in folios 113-115. The applicant was served with that affidavit and each of the exhibits, including copies of the documents in folios 113-115.

³ See *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305.

Judicial review – Partner visa

28. The judicial review of an administrative decision is confined to an examination of the legality of the decision under review. The applicant bears the onus of demonstrating that the approach taken by the decision-maker manifested a legally erroneous view as to what the application for merits review was about such that the decision-maker thereby lacked authority to make the decision that was made.⁴ Judicial review is not a procedure in the nature of an appeal which permits a general review of the decision or a substitution of the decision which the Court considers ought to have been made.⁵
29. Prerogative relief of the kind sought in this application is available only where the impugned decision is affected by jurisdictional error: s 476. Absent jurisdictional error the Court has no jurisdiction to grant relief in respect of the Tribunal's decision: sub-s 476(2).
30. Ministerial satisfaction that a visa applicant has fulfilled the criteria prescribed for that visa is both a condition precedent to the exercise of, and a jurisdictional fact upon which the Minister derives authority to grant an application pursuant to s 65.⁶ Where the Minister is not satisfied that the criteria prescribed for such visa have been satisfied, the application must be refused: s 65(1)(b). Conversely, where the Minister is satisfied that the criteria prescribed for such visa have been satisfied, the application must be granted: s 65(1)(a).
31. Part 8 of Sch 2 to the *Migration Regulations 1994* contains provisions respecting Partner visas. The criteria for a Subclass 820 partner visa are set out in cl 820.2 – 820.6.⁷ Sub-clauses 820.2 – 820.3 prescribe the primary and secondary criteria that must be satisfied in relation to a Subclass 820 partner visa application at the time of making the visa application and at the time of the decision respectively.

⁴*Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173, [24] citing *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, [55] (Gleeson CJ and McHugh J).

⁵*Plaintiff M64/2015* citing *Craig v South Australia* (1995) 184 CLR 163, 175; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41-42; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-36.

⁶*Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, [37]-[38]; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, [40], [102].

⁷ See also reg 801 as to Subclass 801 Partner visas.

32. Regulation 2.03(2) relevantly provided that, if a criterion in Sch 2 referred to a criterion in Sch 3⁸, the criterion so referred to must be satisfied by an applicant as if it had been set out at length in the first-mentioned criterion.
33. Certain additional criteria are imposed in the case of an applicant who was not the holder of a substantive visa. The expression ‘substantive visa’ is given an exclusionary definition⁹ as meaning any visa other than, relevantly, a Bridging visa. Where a person does not hold a substantive visa, criteria to be satisfied at the time of application are that the applicant satisfied Sch 3 criteria 3001, 3003 and 3004: cl 820.211(d)(ii). While the regulation is cast in imperative terms such that each of those criteria must be met, the requirement to satisfy those criteria may be waived where the Minister is satisfied that there are compelling reasons not to do so.¹⁰
34. Clause 820.211(2)(d)(ii) confers a power to decide that Sch 3 criteria 3001, 3003 and 3004 do not apply so that the visa applicant need not satisfy them at the time of the application for the visa: *Waensila v Minister for Immigration and Border Protection*.¹¹
35. An Explanatory Statement¹² in relation to cl 820.211(2)(d)(ii) stated that the new reg included a waiver provision respecting Sch 3 criteria which recognised that hardship could result if an unlawful non-citizen wishing to remain in Australia on spousal grounds was obliged to leave Australia and to re-apply from overseas. The statement further provided that it was expected the waiver would only be exercised where strongly compassionate grounds were shown. Two examples were provided by the statement as illustrating circumstances in which the waiver might be exercised; namely, where:
 - (a) there were Australian born children from the relationship;
 - (b) the applicant and sponsor were in a longstanding relationship (citing for this purpose, a relationship of two years or longer).

⁸ See Reg 1.15 as to Schedule 3 criteria.

⁹ s 5.

¹⁰ cl 820.211(2)(d)(ii).

¹¹ (2016) 241 FCR 121 at [11] (Robertson J, Dowsett and Griffiths JJ agreeing).

¹² Explanatory Statement for the *Migration Regulations (Amendment) 1996 No 75*.

36. In *Waensila*, Robertson J found the statement to be of little assistance.¹³ Contrastingly, Griffiths J regarded the statement as confirming¹⁴ that the purpose of the waiver power was to provide the decision-maker with flexibility to respond to compelling circumstances.¹⁵

37. Neither the Act nor the regulations provide a definition of the expression ‘compelling reasons.’ By contrast, reg 1.20J(2) which imposes limitations on the approval of certain sponsorships (including the sponsorship of partners), allows that the Minister may approve the sponsorship of a visa applicant if the Minister is satisfied that there are compelling circumstances affecting the sponsor.¹⁶

38. The word ‘compelling’ may bear various shades of meaning: *Babicci v Minister for Immigration and Multicultural and Indigenous Affairs*.¹⁷ The Full Court there held that:¹⁸

39. . . . there is no error in construing “compelling circumstances” to mean circumstances which force or drive the decision-maker, in a metaphorical rather than a physical sense, to decide whether or not the jurisdictional fact exists for the exercise of the discretion.

40. Tamberlin, Conti and Jacobsen JJ further held¹⁹ that “on any view of the meaning of that word the circumstances must be *so powerful* that they lead the decision-maker to make a positive finding that the prohibition contained in reg 1.20J(1) should be waived.”

41. In *Plaintiff M64/2015 v Minister for Immigration and Border Protection*,²⁰ the Court was concerned to consider the scope and operation of criteria for a humanitarian visa which required that there be compelling reasons for giving special consideration to granting a permanent visa. While a visa of that kind raised other quite different considerations to those arising in the present case, the plurality noted

¹³ (2016) 241 FCR 121 at [12].

¹⁴ See s 15AB(2) of the *Acts Interpretation Act 1901* (Cth).

¹⁵ (2016) 241 FCR 121 at [56].

¹⁶ Cf Reg 1.15 as to the defined meaning of the expression ‘compelling need to work’.

¹⁷ (2005) 141 FCR 285, [24].

¹⁸ (2005) 141 FCR 285, [21].

¹⁹ (2005) 141 FCR 285, [24].

²⁰ (2015) 258 CLR 173.

that the criterion of compelling reasons recognised that there were more applicants than could, in the Government's judgment, be settled permanently in Australia on humanitarian grounds.²¹ The reasoning of French CJ, Bell, Keane and Gordon JJ also recognised²² that the determination whether compelling grounds were shown served to distinguish the applicant from those other applicants whose individual circumstances might otherwise show merit under the applicable regulation. Their Honours held:²³

42. *Clause 202.222(2)(d) requires consideration of whether there are "compelling reasons for giving special consideration" to granting a visa, taking into account the decisions and guidance of the Australian Government. Choices must necessarily be made in deciding which applicants should be given special consideration. Whether there are compelling reasons for making a particular choice may be affected by the number of available places.*

43. This reasoning provides context to the need to show compelling reasons before criteria otherwise applicable to a particular class of visa should be waived for the benefit of the individual.

44. Gageler J contrasted²⁴ a statutory requirement that a decision-maker:
- a. arrive at a state of 'satisfaction' as a precondition to an exercise of statutory power; and
 - b. be satisfied that there are 'compelling reasons' for taking particular action.
- a) His Honour considered that in the former case, satisfaction of a precondition necessitated that the decision-maker feel a sense of actual persuasion²⁵ or an inclination of the mind towards assenting to, rather than rejecting, a proposition.²⁶ In the latter case, satisfaction of the existence of compelling reasons was a requirement that the decision-maker be persuaded there were reasons in favour of taking that action

²¹ (2016) 258 CLR 173, [32].

²² (2016) 258 CLR 173, [38].

²³ (2016) 258 CLR 173, [44], see also at [51].

²⁴ (2016) 258 CLR 173, [64].

²⁵ Citing *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361;

²⁶ Citing *George v Rockett* (1990) 170 CLR 104, 116.

which, when weighed within the context of the particular statutory scheme, were irresistible.²⁷

45. In *Waensila* the Full Court held that in considering whether compelling reasons were shown for not applying Sch 3 criteria pursuant to cl 820.211(2)(d)(ii), the Minister was not confined to a consideration of reasons which may have existed at the time of the application. In reaching that conclusion the Court applied the holding in *Berenguel v Minister for Immigration and Citizenship*²⁸ that properly construed a regulation may not speak exclusively to satisfaction at the time of the application and that up to date information should be considered: see ss 54-55(1). Robertson J, with whom Dowsett J agreed, held that “in the ordinary case a decision-maker was required to take into account all the information before him or her.”²⁹ Robertson and Griffiths JJ regarded the text and purpose of the reg as contraindicating a limited construction of the waiver power.³⁰ Robertson J concluded that:

46. *Conferred on the Minister is a discretionary power to be satisfied that the specified criteria, being Schedule 3 criteria 3001, 3003 and 3004, do not apply. It is a power, where the Minister is satisfied that there are compelling reasons for doing so, to effect the result that the visa applicant is not required to meet those criteria which would otherwise be required to be satisfied at the time of application.*

47. Griffiths J concluded that:³¹

48. *The waiver power was obviously intended to be available to deal with cases where there were “compelling reasons” for not putting particular applicants to the hardship of having to leave Australia for that purpose. Given the nature of that power and the time when its possible application arises for consideration, clear words are required which would have the effect of confining that consideration to events which only existed at the time the visa application was made.*

²⁷ Citing *Babicci*.

²⁸ (2010) 84 ALJR 251 at [24], [26] (French CJ, Gummow and Crennan JJ).

²⁹ (2016) 241 FCR 121 at [14] citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 45. There Mason J, stated that as a matter of statutory construction that: “. . . there may be found in the subject-matter, scope and purpose of nearly every statute conferring power to make an administrative decision an implication that the decision is to be made on the basis of the most current material available to the decision-maker.”

³⁰ (2016) 241 FCR 121 at [16]-[18], [49]-[53].

³¹ (2016) 241 FCR 121 at [54].

49. More recently, in *Choi v Minister for Immigration and Border Protection*,³² Allsop CJ considered the Sch 3 criteria and the issue of hardship in the context of a partner visa application. The Chief Justice considered that “compelling reasons must be sufficiently powerful to lead the relevant decision-maker to make a positive finding in favour of waiving the required criteria.”³³ The Chief Justice accepted that “the decision-maker must engage in an active, genuine and intellectual process to satisfy the mandatory consideration of whether such compelling reasons exist.”³⁴ The only live issue before his Honour was whether the Sch 3 criteria ought to have been waived.
50. Allsop CJ acknowledged that, while compelling reasons were not confined to hardship, it was the element most commonly referred to.³⁵ The Chief Justice identified three reasons why this seemed to be the case: (1) the examples provided in the Explanatory Statement served to emphasise that hardship played a primary role in the consideration of whether compelling reasons were made out; (2) as the existence of a genuine relationship was a precondition to the visa application, hardship provided an additional impetus for waiver and may extend beyond the applicant to third parties including the sponsor and any children; (3) the Tribunal was not confined to a pre-conceived idea of hardship but would respond to arguments in a particular case. His Honour accepted that hardship was not the sole factor to be considered.
51. In conducting its review, a Tribunal may exercise all of the powers and discretions that are conferred on the person who made the decision: s 415. As the Minister has a duty to consider a valid visa application, which duty continues until, amongst other circumstances, the visa application is granted or refused,³⁶ the Tribunal must likewise do so.

Consideration

52. The applicant was self-represented before me and in those circumstances I have re-examined the decision of the Tribunal together with the materials which were before it.

³² [2018] FCA 291.

³³ Citing *Babici* (2005) 141 FCR 285, [24].

³⁴ Citing *MZYPZ v Minister for Immigration and Citizenship* [2012] FCA 478, [19].

³⁵ [2018] FCA 291 at [30]-[36].

³⁶ See s 47.

53. In addition to the six grounds of review that were set out in the application for judicial review the Minister, as Model Litigant, has drawn attention to two other matters which are dealt with below.
54. As the Minister submitted, the grounds of review were largely indicative of the applicant's emphatic disagreement with the findings made by the Tribunal. Insofar as they sought the conduct of a further merits review, it is no part of the function of this Court on an application for judicial review to engage in fact-finding about the merits of the applicant's case.³⁷

Ground 1 – disagreement with Reasons, [18]

55. Ground 1 reads:

I do not agree with number and clause no. 18

I have never mention[ed] that circumstances were outside my control before my partner visa.

56. Paragraph 18 of the Reasons state:

Mr Mor told the Tribunal that circumstances outside his control led to him not holding a substantive visa at the time he applied for the partner visa.

He said that he only discovered that he did not hold a visa when he attempted to depart Australia in July 2013. He said that the department did not phone him or email him about his visa status.

57. Before me, the applicant confirmed that he had indeed only discovered that his student visa had been cancelled in July 2013 when he attempted to leave Australia to travel to Jakarta.
58. Before the Tribunal Mr Mor's reason for not holding a substantive visa relied on the Department's failure to notify him of that fact. The Tribunal rejected this submission, considering awareness of the expiry date of his visa to be the applicant's responsibility. The Tribunal did not accept that Mr Mor's claim that he did not hold a substantive visa due to circumstances beyond his control as being a compelling reason not to apply the Sch 3 criteria to his application: Reasons, [19].

³⁷*NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10 at [10]; *SZSSG v Minister for Immigration and Border Protection* [2018] FCA 670 at [6].

59. Ground 1 seeks an impermissible merits review of the circumstances in which the applicant's student visa was cancelled. Ground 1 is rejected.

Ground 2 – disagreement with Reasons, [25]

60. Ground 2 reads:

I do not agree with the member of Tribunal with Clause 25 Because I have provide[d] dated photos of 2013 and 2014 and the evidence has been ignored.

61. Paragraph 25 of the Reasons state:

The Tribunal has had regard to photographs of the parties in social settings. However, while Mr Mor has labelled the photographs as being taken over the period 2013 to 2014, these photographs themselves are not dated. The Tribunal accepts that the photographs indicate that the parties have socialised together, however it does not accept that the photographs indicate that they socialised as partners since 2013.

62. The Tribunal may be understood as indicating that the photographs did not contain an embedded recording of the date on which those photographs had been taken.
63. Contrary to the applicant's stated ground, the Tribunal did not ignore the photos which he tendered at the hearing. It accepted that the applicant and his sponsor did socialise together. The Tribunals' finding was that it did not accept the photographs had been taken in 2013 – 2014. It did not do so because there was no independent verification of the dates on which the photographs were taken.
64. Having regard to the other findings made respecting the applicant's credibility it was open to make the finding as to the photographs which it did. This finding must be read with the Tribunal's other findings which accepted that the applicant and his sponsor did socialise and that the Tribunal did have regard to those photos. They were not ignored.
65. Ground 2 is without merit.

Grounds 3 & 4 – disagreement with Reasons, [31]-[32]

66. Grounds 3-4 can be dealt with together. Each involves an attempt by the applicant to adduce further evidence on judicial review.

67. Ground 3 reads:

I do not agree with the member of Tribunal with clause no. 31. I have the evidences (sic) to prove that me and my partner only sep[a]rated for 15 days and every relationship does have small fights and arguments in household. I can provide more evidence to prove my long steady relationship with my partner and her children.

68. Ground 4 reads:

I do not agree with the member with clause no 32 Because we have used our joint bank account and I have the evidence to prove that we use our joint account whenever it's needed.

69. Paragraphs 31-32 of the Reasons state:

The Tribunal does not accept that the Interim Intervention Order was merely the result of a fight. The Tribunal also does not accept that the parties only separated for 15 days. The Tribunal finds that Mr Mor was untruthful in his evidence to the Tribunal about his relationship with the sponsor in regard to the Interim Intervention Order. In the context of minimal probative evidence of a de facto relationship, the Tribunal is not satisfied that Mr Mor's claim of a long-standing relationship is a compelling reason to not apply the schedule 3 criteria.

Mr Mor said that he has not worked since March 2013 and he has been financially dependent on the sponsor for over 3 years, and this is very difficult for them both. He said that they have a joint bank account but they do not use it now. They each have personal accounts, and the sponsor gives him money as he needs it.

70. Grounds three and four express the applicant's disagreement with the Tribunal's findings.

71. Each ground indicates that the applicant wished to adduce additional evidence in relation to the period of his separation from his sponsor,³⁸ his long steady relationship with his sponsor and her children and in

³⁸ Presumably following the making of the intervention order.

relation to a joint bank account. Before me he stated that he had moved in with his sponsor in early 2013. The visa application was made on 8 May 2015.

72. Fresh evidence is not admissible on an application for judicial review unless it bears upon an identified jurisdictional error.³⁹ Beyond exhibiting a copy of the Reasons, the applicant's affidavit did not identify any further evidence which he sought to rely upon.
73. Further, in the exercise of the Court's discretion whether to admit further evidence on judicial review, consideration is also required whether "the evidence is of such relevance and weight that its admission would be likely to lead to a different result."⁴⁰ It is not open to a party on judicial review to simply ask the Court to admit new evidence for the purpose of inviting the court to disagree with a factual conclusion that was reached by the Tribunal.⁴¹
74. The applicant was invited to attend before the Tribunal to adduce evidence and present arguments in relation to the issues arising upon the decision under review.⁴² It was at the Tribunal hearing that the applicant was afforded the opportunity to adduce evidence of the kind referred to in these grounds. No evidence bearing on the issues raised by Grounds 3 or 4 had been identified and I cannot conclude that any would be of such relevance or weight as to justify the exercise of discretion to allow the applicant to adduce evidence on judicial review in relation to those grounds. At the Tribunal hearing, the applicant had provided no further documentary evidence. In this proceeding the applicant's affidavit merely exhibited the Reasons.

75. Grounds 3-4 are rejected.

Ground 5 – disagreement with Reasons, [37]-[38]

76. Ground 5 reads:

³⁹*SZJMG v Minister for Immigration and Citizenship* [2008] FCA 1145 at [27]; *Gupta v Minister for Immigration and Border Protection* [2016] FCA 1004 at [27].

⁴⁰*Sami v Minister for Immigration and Citizenship* (2013) ALD 1 at [7]; *MZZUQ v Minister for Immigration and Border Protection* (2015) 145 ALD 157 at [24].

⁴¹*MZXHY v Minister for Immigration and Citizenship* [2007] FCA 622 at [8]; *AIM15 v Minister for Immigration and Border Protection* [2017] FCA 734 at [31].

⁴² s 360.

I do not agree with the member with clause 37, 38 that I do not have emotional and practical relationship with kids. She was the primary carer for kids but now we both are attached emotionally and practically to kids. All the compelling reason has been ignored.

77. Paragraphs 37-38 of the Reasons state:

78. The evidence before the Tribunal is that the sponsor is financially independent, she owns her home, has a strong social network, and is the primary carer for her twin daughters. The Tribunal has had regard to the applicant's evidence that the sponsor has a strong emotional attachment to him and that the sponsor will find it difficult to be separated from him. The Tribunal considers that emotional attachment is a normal part of a partner relationship, therefore it would not, in itself, give rise to compelling reasons.

79. The Tribunal has considered Mr Mor's evidence that he is close to his sponsor's daughters and that he cares for them. However the Tribunal is mindful that both Mr Mor and the sponsor indicated that the sponsor is the primary carer of the twins, and that Mr Mor 'helps out' with them. On the evidence, the Tribunal is not satisfied that the twins rely on Mr Mor for emotional or practical support as such that it would be a compelling reason to not apply the criteria.

80. Ground 5 also expresses the applicant's disagreement with the Tribunal's findings of fact.

81. It will be recalled that the applicant and his sponsor gave evidence. The Tribunal expressly considered the applicant's relationship with his sponsor and her children: Reasons, [14], [33], [38]. The Tribunal was not satisfied that the sponsor's children relied upon the applicant for emotional or practical support of such a kind as to constitute a compelling reason not to apply the Sch 3 criteria.

82. On the evidence and material available to the Tribunal, I discern no error in the conclusion reached that the applicant's claim concerning the emotional or practical support provided by him to the sponsor or her children provided a compelling reason not to apply the Sch 3 criteria. The finding made was open on the material.

83. Ground 5 is rejected.

Ground 6 – disagreement with Reasons, [39]

84. Ground 6 reads:

*Accordi[n]g to the member of tribunal in clause no. 39 Member said its not gonna effect anyone with our sep[a]ration but I would like to mention that **the sep[a]rations even for limited time period does effect children emotionally and mentally***

All the kids are different and they have different relationships with their family. The members can not just as[s]ume the extension of emotional and mental attachment with kids and myself and Time does not specify the time period of this temporary s[e]peration. I might not see them again.

All these compelling reason has been ignored by the member of Tribunal to apply the critiria. (Emphasis added)

85. Paragraphs 39 of the Reasons state:

86. The Tribunal acknowledges that the parties may be unhappy about being separated if Mr Mor applies for the visa offshore. It is common for families to experience temporary separation for various reasons, and it is understandable that such separation results in a degree of emotional hardship. The Tribunal does not however consider that any unhappiness resulting from separation, potentially for a limited period, is a compelling reason not to apply the criteria.

87. The applicant appreciated that he could apply from overseas for a visa.

88. Contrary to the applicant's Ground 6, the Tribunal made no finding that there would be no 'emotional' or 'mental' effect on the sponsor's children if the applicant was required to apply from overseas for a visa. The finding made by the Tribunal on this issue was set out in [39] of its Reasons and are reproduced at [74] above.

89. It was open to the Tribunal to conclude that the matters relied upon by the applicant did not provide a compelling reason not to apply the Sch 3 criteria. Ground 6 is rejected.

Section 376 certificate – procedural fairness

90. By sub-s 376(3), where a Tribunal is given a document or information in confidence⁴³ and is notified that s 376 applies, the Tribunal may, for the purpose of the exercise of its powers, have regard to any matter contained in the document or information and may, under certain conditions, disclose such matter to the applicant or any person who has given evidence to the Tribunal.
91. As noted above, the affidavit filed by the respondent's solicitor exhibited the s 376 certificate which confirmed that the information within folios 113-115 contained the interim IVO and the related family violence application which was made returnable before a local court.
92. In this proceeding, the Minister disavowed any claim for privilege or to protect confidentiality in those documents. The Minister confirmed that no claim of public interest immunity was made. The documents were served on the applicant as exhibits to the solicitor's affidavit.
93. Having drawn the Court's attention to the fact that there was material before the Tribunal which was initially not revealed to the applicant, and Minister concedes that a Tribunal may fall into jurisdictional error where it has not disclosed the existence of a s 376 certificate to an applicant or kept material confidential and not informed the applicant of its existence or provided him or her with an opportunity to make submissions: *MZAFZ v Minister for Immigration and Border Protection*;⁴⁴ *Minister for Immigration and Border Protection v Singh*.⁴⁵
94. Non-disclosure to an applicant of the existence of an s 376 certificate may constitute a denial of procedural fairness by reason that, if the certificate is invalid, a Tribunal is not permitted to withhold the relevant information. The applicant may thereby be denied an opportunity to seek to rely upon, counter or comment upon such information. Denial of procedural fairness may flow where the information in the document withheld had formed the reason or part of the reason for a Tribunal's decision to affirm a delegate's decision to refuse a visa application.⁴⁶

⁴³ And s 375A does not apply to the document or information.

⁴⁴ (2016) 243 FCR 1.

⁴⁵ (2016) 244 FCR 305.

⁴⁶ See par 359A(1)(a).

95. I do not find it necessary to decide whether the s 376 certificate was invalid as the documents and information contained in them was disclosed to the applicant who was afforded an opportunity to respond to it and did so: cf *MZAFZ*.⁴⁷ Further, the documents and information contained in them were known to the applicant from early 2016.⁴⁸
96. I have outlined above that the applicant initially denied to having ever separated from his sponsor or that an IVO had been taken out against him. The applicant was then afforded an opportunity pursuant to s 359AA to comment upon or respond to information adverse to his case – the information being that contained in the IVO. As the Reasons confirm, the applicant did respond to that information and explained the circumstances in which that IVO had been issued and that he had also separated from his sponsor for a period of some 15 days. Thereafter the sponsor had not attended a hearing on the return date of the family violence complaint and that application was dismissed.
97. While he had filed no affidavit before me, the applicant also submitted that the circumstances leading to the issue of the IVO had involved him ringing his sponsor to enquire of her well-being during the 15 day period in which they had been separated.
98. The applicant accepted that he had been served with the affidavit affirmed on behalf of the Minister which exhibited the documents described above. In the result, the applicant had been given those documents and afforded an opportunity to take issue in relation to the possible impact that those documents might have had in relation to the conduct of the hearing before the Tribunal, the merits review of the delegate's decision more generally or the decision of the Tribunal itself.
99. In *Re Refugee Tribunal; Ex parte Aala*, Gaudron and Gummow JJ observed⁴⁹, albeit in the context of a protection visa application, that the cogency of an applicant's evidence was of the greatest importance in the evaluation of a visa application and that the content of the requirement of procedural fairness may fluctuate in the course of the particular administrative decision-making process.

⁴⁷ (2016) 243 FCR 1 at p. 9, [30], [33].

⁴⁸ Cf *MZAFZ* 243 FCR 1 at [51].

⁴⁹ (2000) 204 CLR 82, [61]-[62] (Gleeson CJ agreeing).

100. In *Minister for Immigration and Border Protection v SZSSJ*,⁵⁰ the Court considered some basic principles in an evaluation of whether there had been a denial of procedural fairness. The Court observed⁵¹ that an aspect of the entitlement to be accorded procedural fairness was that a person be put on notice of the nature and content of information that might be taken into account as a reason for coming to a conclusion adverse to that person.
101. In this case, the applicant had been served with the IVO. He well knew of the hearing following the making of an interim IVO. It appears that the Tribunal's disclosure of that order had been timed to occur after the Tribunal had put to the applicant the issue of his having separated from the sponsor and of the making of an IVO against him. It was after the applicant had denied having separated from his sponsor or having had an IVO issued against him that the document was put before him and he was afforded an opportunity to comment on it. He did so.
102. When the matter was canvassed with the applicant, he was able to address without difficulty the granting of the IVO and the fact of his separation from the sponsor. In the circumstances that the documents had been disclosed to the applicant for the purposes of this application, I considered that no unfairness would be occasioned to him by the Court also examining the information contained in those documents: *Minister for Immigration and Border Protection v BJNI6*.⁵²
103. Having looked at the documents, I consider that they were relevant to the issues arising before the Tribunal. The folios comprised documents which had been served on the applicant at the time the IVO was granted. The content of folios 113-115 comprised two documents: (1) the interim IVO made on 8 February 2016; (2) a notice of hearing in respect of the IVO.
104. Different problems are thrown up by cases involving the non-disclosure of an s 376 certificate and documents and information to which it relates. In some cases, the merits review application proceeds to conclusion without the applicant being aware at any stage of the fact of the certificate, the documents or the information which they

⁵⁰ (2016) 259 CLR 180.

⁵¹ (2016) 259 CLR 180 at [83].

⁵² (2017) 253 FCR 21 at [73].

contained. In other cases, the applicant may not be aware of the fact of the certificate but may already be in possession of the documents to which it relates. In others, the document may be disclosed in the course of the hearing in discharge of the obligation which is created by s 359AA. It is for such reasons that the content of the obligation of procedural fairness fluctuates. In each case, the question whether procedural fairness has been extended to the applicant will raise different considerations.

105. In this case the s 376 certificate was not disclosed and the documents were not disclosed by the Tribunal until the hearing. As concerns non-disclosure of the certificate, it is necessary to examine the extent and consequences of the departure from the obligation to do so, including whether the applicant lost the opportunity to advance his case.⁵³
106. The present case is distinguishable from circumstances in which material is never revealed to an applicant. In cases of that kind questions will arise whether the documents contained material that, on no view could be thought to have prejudiced the interests of the applicant and could not and did not, even possibly, undermine the applicant's prospects of a favourable decision by the Tribunal: *SZVDC Minister for Immigration and Border Protection*;⁵⁴ *BEG15 v Minister for Immigration and Border Protection*;⁵⁵ *BJN16*;⁵⁶ *Minister for Immigration and Border Protection v CQZ15*.⁵⁷
107. In the most recent of those appeals, *SZVDC*, the Full Court observed⁵⁸ that as the adverse information had been contained in the court book, the applicant had been able to address the material.
108. By extension, in this case, the IVO and notice of hearing were documents that had been served on the applicant in 2016 and he had been able to address them when the relevance of those matters arose before the Tribunal. I consider that a failure to reveal to the applicant both the existence of and nature of the documentation until the hearing resulted in no denial of procedural fairness to the applicant. In

⁵³*Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627, [35]-[36]; *CZQ15*, (2017) 253 FCR 1, [74]-[76].

⁵⁴ [2018] FCAFC 16 at [63].

⁵⁵ (2017) 253 FCR 36.

⁵⁶ (2017) 253 FCR 21.

⁵⁷ (2017) 253 FCR 1 at [72].

⁵⁸ [2018] FCAFC 16, [80].

accordance with s 359AA, the Tribunal put the IVO to the applicant and afforded⁵⁹ him an opportunity to comment on adverse information which it contained. In my opinion, no practical injustice⁶⁰ was occasioned to the applicant. The discrete failure to disclose the fact of the issuing of the s 376 (as distinct from disclosure of the IVO during the hearing) was a technical breach⁶¹ and did not of itself have the consequence of a denial of procedural fairness. However, a denial of procedural fairness does not always flow from non-disclosure of an s 376 certificate. Such non-disclosure, coupled with a conclusion that the certificate was invalid and non-disclosure or production of documents which were not already in the applicant's possession, would give rise to quite different considerations and consequences.

109. On 10 May 2018, special leave was granted to appeal the decisions in *BEG15* and *CQZ15*. The Minister submitted that I should decide the matter on the law as it presently stands. I accept that submission in the combined circumstances of the applicant being aware of the documents, having been shown the documents at the hearing and given an opportunity to comment on the adverse information which they contained and my conclusion that no lack of procedural fairness to the applicant is shown in all the circumstances.⁶²

Continuing spousal relationship

110. I have examined the authorities concerning the nature of the requirement that compelling reasons be shown for waiving Sch 3 criteria in the determination of a partner visa application.
111. In particular, I have considered the principles examined in *Choi* where Allsop CJ held that, in the circumstances of that appeal, hardship of the applicant and her sponsor was not shown to be of such moment as to constitute compelling reasons for not applying the Sch 3 criteria.
112. I also accept the submission that the existence of a genuine and continuing relationship does not of itself constitute a compelling reason

⁵⁹ Cf *BJN16*, (2017) 253 FCR 36 at [63]-[64].

⁶⁰Cf *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, [38] (Gleeson CJ); *Minister for Immigration and Citizenship v WZARH* (2015) 256 CLR 326, [57]; *BEG15*, (2017) 253 FCR 36 at [33]; *CZQ15*, (2017) 253 FCR 1, [66].

⁶¹*WZARH* (2015) 256 CLR 326, [57]; *AVO15 v Minister for Immigration and Border Protection* [2017] FCA 566, [87]-[91]; *CZQ15*, (2017) 253 FCR 1, [83].

⁶² Cf *SZVDC* [2018] FCAFC 16, [74].

not to apply the Sch 3 criteria. As noted above, the Explanatory Statement identified that the waiver of those criteria may be warranted where the applicant and sponsor had had children or been in a sufficiently longstanding relationship.

113. In the present case, the applicant began cohabiting with his sponsor in early 2013. The Tribunal hearing occurred in June 2016 and the Tribunal heard evidence from both the applicant and his sponsor. There is nothing to indicate that the Tribunal did not take into account this up to date information in making an assessment of the matter.

Conclusion

114. Although the applicant discovered in July 2013 that his student visa had been cancelled, he responded by seeking a protection visa and then ministerial intervention.
115. It was not until May 2015 that the applicant made an application for a partner visa. It was made out of time. The applicant had last held a substantive visa in 2013. The partner visa application was grounded upon a relationship with the applicant's sponsor. As the application was out of time, the applicant needed to persuade the Tribunal that the Sch 3 cl 3001 criteria otherwise applicable should be waived. To do so it was necessary to demonstrate that compelling reasons supported that conclusion. The sponsor's children are not children of the applicant. The applicant had however cohabited with his sponsor and her children from early 2013.
116. Three reasons were advanced why waiver of Sch 3 cl 3001 criteria should occur. The Tribunal considered each of the matters advanced by the applicant as supporting a conclusion that there were compelling reasons to waive the requirements of cl 3001 in Sch 3. The Tribunal gave proper consideration to each of those matters. It was open to the Tribunal to conclude that none of those matters assessed individually or collectively required the Tribunal to be satisfied that compelling reasons were shown for not applying the Sch 3 cl 3001 criteria. In those circumstances it was unnecessary to consider the cl 3003 or 3004 criteria. The Tribunal was entitled to conclude that the reasons advanced by the applicant were neither so powerful as to support, nor

irresistible in supporting, a conclusion that the Sch 3 criteria should be waived in his case. No jurisdictional error is shown.

117. The application should be dismissed.

I certify that the preceding one hundred and five (105) paragraphs are a true copy of the reasons for judgment of Judge A Kelly

Date: 14 June 2018